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No. 02-

IN THE

Supreme Court of the United States

IN RE PHILADELPHIA NEWSPAPERS, INC.:

PHILADELPHIA NEWSPAPERS, INC.,
Petitioner,

v.

NEW JERSEY AND FRED NEULANDER,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an order barring the press from contacting or attempting to interview discharged jurors—for any reason, regarding any subject, and regardless of whether the juror voluntarily initiates such contact—based solely on speculation concerning advantages that publication of juror remarks might confer on the prosecution on a retrial, abridges the freedom of the press in violation of the First and Fourteenth Amendments to the United States Constitution.

RULE 29.6 STATEMENT

Philadelphia Newspapers, Inc., is a wholly owned subsidiary of Knight Ridder, Inc.

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Gannett Co., Inc. v. *DePasquale*, 443 U.S. 368 (1979) 27
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Globe Newspaper Co. v. *Superior Court*, 457 U.S. 596 (1982) 12, 24, 26
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Press-Enterprise Co. v. *Superior Court*, 464 U.S. 501 (1984) 12
Press-Enterprise Co. v. *Superior Court*, 478 U.S. 1 (1986) 12, 26, 27
Richmond Newspapers, Inc. v. *Virginia*, 448 U.S. 555 (1980) 26
Sentinel Communications Co. v. *Watson*, 615 So. 2d 768 (Fla. Dist. Ct. App. 1993) 20

State ex rel. Cincinnati Post v. *Court of Common Pleas*, 59 Ohio St. 3d 103, 570 N.E.2d 1101 (1991) 20
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OTHER AUTHORITIES

Amon, Elizabeth, *When Jurors Decide to Write Books: Andersen Trial Raises Questions About Impact on Deliberations*, National Law Journal, July 8, 2002, at A6 16

Burnett, D. Graham, *A Trial By Jury* (2002) 16

Court Rejects Bid Against Ban on Contacting Jurors, San Antonio Express-News, Sept. 26, 2001, at 2B, *available at* 2001 WL 26840574 25

Gambardello, Joseph A., et al., *Rabbi Juror: "We All Saw It A Totally Different Way,"* Philadelphia Inquirer, Nov. 16, 2001, at A1, *available at* 2001 WL 29265198 16

Gauthier, Ashley, *Two Courts Bar Juror Contact*, News Media & L., Oct. 1, 2001, at 46, *available at* 2001 WL 18209346 25

Gaza, Copernicus T., Note, *Getting Inside the Jury's Head: Media Access to Jurors After the Trial*, 12 N.Y.L. Sch. J. Hum. Rts. 311 (1995) 23

Goldstein, Abraham S., *Jury Secrecy & the Media: The Problem of Postverdict Interviews*, 1993 U. Ill. L. Rev. 295 23

Grace, Melissa, *Jurors Let Verdict Speak for Itself*, Times Union (Albany), Feb. 26, 2000, at A5, *available at* 2000 WL 6732447 26

Handbook for Trial Jurors Serving in the United States District Courts, *at* http://www.dcd.uscourts.gov/juryhandbook.html 21

Iversen, Christine J., Comment, *Post-verdict Interviews: The Key to Understanding the Decision Behind the Verdict*, 30 J. Marshall L. Rev. 507 (1997) 23

Marder, Nancy S., *Deliberations and Disclosures: A Study of Post-verdict Interviews of Jurors*, 82 Iowa L. Rev. 465 (1997) 23

Note, *Public Disclosures of Jury Deliberations*, 96 Harv. L. Rev. 886 (1983) 23

Supreme Judicial Court of Massachusetts Judiciary/Media Steering Committee, *Guidelines on the Public's Right of Access to Judicial Proceedings and Records* (2000) *at* http://www.state.ma.us/courts/courtsandjudges/courts/supremejudicialcourt/pubaccesstoc.html 21

Teachey, Lisa, *Court Orders Alarm Media Legal Experts*, Houston Chronicle, Nov. 20, 2002, at 27, *available at* 2002 WL 23239458 25

Weinstein, David, *Protecting a Juror's Right to Privacy: Constitutional Constraints & Policy Options*, 70 Temp. L. Rev. 1 (1997).....23

Winer, Dave, *Jury Duty*, DaveNet, Mar. 1, 1996, *at* http:// davenet.userland.com / 1996 / 03 / 02 / juryduty.....16

PETITION FOR A WRIT OF CERTIORARI

Petitioner Philadelphia Newspapers, Inc., as publisher of *The Philadelphia Inquirer*, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of New Jersey in this case.

OPINIONS BELOW

The order of the Supreme Court of New Jersey (Pet. App. 1a-4a) is not reported. The opinion of the Supreme Court of New Jersey (Pet. App. 5a-48a), supporting its prior order, is reported at 173 N.J. 193, 801 A.2d 255 (2002). The court's order denying reconsideration (Pet. App. 49a) is not reported. The opinion of the Superior Court of New Jersey, Appellate Division (Pet. App. 51a-56a) is not reported. The relevant orders of the Superior Court of New Jersey, Law Division (Pet. App. 57a-64a) are not reported. The transcripts of the oral rulings by the Superior Court, Law Division on petitioner's motions have been reproduced as Appendices H and I to this petition (Pet. App. 65a-72a).

JURISDICTION

The opinion of the New Jersey Supreme Court was issued on July 18, 2002. The court denied Philadelphia Newspapers' motion for reconsideration on September 18, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Speech and Press Clauses of the First Amendment to the United States Constitution provide: "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. I. The Sixth Amendment, as relevant, provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. Const. amend. VI. The Due Process Clause of the Fourteenth Amendment provides: "No state shall . . . deprive any person of life, liberty, or property,

without due process of law . . . ." U.S. Const. amend. XIV § 1.

STATEMENT OF THE CASE

This case involves an expansive prior restraint on the press based solely on highly dubious speculation about possible effects that publication of discharged jurors' comments might have on a capital defendant's right to a fair retrial. The court order at issue remained in effect for more than a year after a mistrial was declared in the defendant's first trial. As affirmed and expanded by the Supreme Court of New Jersey, the order barred the press from contacting or attempting to interview discharged jurors for any reason, regarding any subject, and even if the juror initiated such contact. In the view of that court, this prior restraint complied with the First Amendment because any publication of jurors' remarks that might have followed a press interview, if read by prosecutors, "might" have conferred an unfair advantage on the State in the retrial of this capital case.

The decision of the New Jersey Supreme Court, upholding a prior restraint for the slimmest and most speculative of reasons, represents a new extreme on the spectrum of judicial opinion in this area, and reflects significant confusion in the lower courts concerning the permissibility of restraints on press interviews of discharged jurors. If permitted to stand, it threatens serious dilution of important First Amendment protections established in prior decisions of this Court—protections which serve not only an informed citizenry but also the integrity of the judicial process itself. The case therefore presents an important opportunity for this Court to clarify the extent of a trial court's authority to restrain the press.

1. In June 2000, a grand jury for Camden County, New Jersey indicted Fred Neulander, a former rabbi at one of the largest synagogues in South New Jersey, for murder, felony murder, and conspiracy in connection with the November

1994 death of his wife. The prosecutor sought the death penalty. Pet. App. 6a.

The proceedings attracted widespread, intensive public attention. Media interest, as a result, was significant. For example, the CourtTV network applied to televise the trial. In light of the heightened public interest, on July 18, 2001, the Superior Court met with press representatives and issued an order governing media coverage. The court permitted live television coverage. Pet. App. 7a. Two provisions of the court's order, however, directly restricted the ability of the press to gather and publish news. Paragraph 13 of the order stated: "Neither the identity nor descriptions that would reasonably identify any juror may be publicized, in any way, unless authorized by further Order of this Court." *Id.* at 60a. Paragraph 15 provided: "Media representatives shall not contact or attempt to interview any juror or potential juror." *Id.* Paragraph 15, as later modified by the trial court and state supreme court, is the subject of the present certiorari petition.

Prior to trial, petitioner Philadelphia Newspapers, Inc. ("Philadelphia Newspapers"), publisher of *The Philadelphia Inquirer*, and The Associated Press moved to vacate paragraph 13, and to modify paragraph 15 to clarify that it would expire upon discharge of the jury. The trial court denied the motion. Pet. App. 61a-62a. Acknowledging that interviews of discharged jurors presented an issue different than interviews conducted during trial, the court modified paragraph 15 as follows: "Media representatives shall not contact or attempt to interview any juror or potential juror; however, subsequent to entry of the verdict in this case petitioners may apply to this court for relaxation of the provisions of this paragraph." *Id.* The court also refused to modify paragraph 13.[1] Philadelphia Newspapers and The

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[1] Although recognizing that the media had attended voir dire proceedings in which jurors' names had been made public, the court

Associated Press filed an emergency appeal with the Appellate Division, but that court denied leave for the appeal. *Id.* at 8a.

Trial testimony commenced on October 15, 2001, and ended on November 2, 2001. Extensive media coverage accompanied virtually all aspects of the trial. CourtTV provided gavel-to-gavel coverage of the entire trial, commentators analyzed the strengths and weaknesses of both sides' cases as the trial progressed, and news stories and other trial-related information were gathered and published on a number of Internet sites. Pet. App. 8a, 42a-43a. After lengthy deliberations, the jury was unable to return a verdict. The court declared a mistrial and discharged the jury on November 13, 2001. *Id.* at 8a.

Once the court discharged the jurors, Philadelphia Newspapers and several other media organizations moved immediately to vacate paragraphs 13 and 15 of the court's media order. Philadelphia Newspapers argued that paragraph 15 violated the First Amendment. The court denied the motions, noting broadly that whenever jurors believe that they may be contacted after trial, their awareness may negatively affect jury deliberations:

> [I]f there were to be a relaxation of either of these two provisions it has the capacity to undermine or weaken [Neulander's] right to a fair trial .... [J]urors who are summoned for possible jury service, whether it be in this county or in another county, will know that they run the risk of having their names published and they run the risk of

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believed a ban on publishing juror names was necessary to protect Neulander's right to a fair trial: "[I]f a juror knows that his name will be published or if someone tells him that another name was published, ... we will not ever receive the types of honest answers during voir dire that Fred Neulander is constitutionally entitled to receive." Pet. App. 66a-67a.

> having their private deliberations in the jury room discussed, analyzed, broadcast, or in other ways disseminated . . . . [T]hose things do have the capacity to chill the free exchange of ideas in the jury room and will also have the capacity to restrict the jury pool that is available for this case.

Pet. App. 72a. The Superior Court entered an order formally clarifying that paragraphs 13 and 15 remained in full force and effect. *Id.* at 63a-64a. Philadelphia Newspapers appealed immediately. The Superior Court then sent a letter to the Appellate Division (*id.* at 73a-75a) amplifying the reasons for its denial of the relief sought by the media. *See* N.J. Ct. R. 2:5-1(b). The court explained its belief that after the conclusion of the trial the media had violated the court order by, *inter alia*, broadcasting footage of the jurors leaving the courthouse and attempting to contact discharged jurors. The court also noted that *The Philadelphia Inquirer* had published the name of the jury forewoman, in an article questioning whether she resided in New Jersey.

2. The Appellate Division affirmed in a per curiam opinion, acknowledging the important First Amendment right at issue but finding that interviews with discharged jurors and publication of their names "would pose a clear and present danger to defendant's right to a fair trial." Pet. App. 52a. Specifically, notwithstanding the blanket television coverage of the first trial, the Appellate Division feared that "disclosure of the deliberations of the discharged jury would have a significant capacity to contaminate the future jury pool." *Id.* at 55a. The court concluded that less-restrictive measures—including change of venue and careful voir dire—would not sufficiently "insulate a future jury from the contaminating effect of the publication of the deliberations of the discharged jury." *Id.*

3. Philadelphia Newspapers appealed to the New Jersey Supreme Court. On April 22, 2002, that court released a brief order vacating in part, affirming in part, and modifying

the Superior Court media order. Pet. App. 1a-4a. Although the court vacated paragraph 13 in pertinent part, it affirmed and actually expanded paragraph 15 to provide "that the prohibitions ... shall apply as well to communications between the media and jurors, including discharged jurors, that might otherwise be initiated by jurors." *Id.* at 2a.[2]

The Supreme Court of New Jersey explained the basis for its order in a published opinion issued on July 18, 2002. Pet. App. 5a-48a. The court rejected the various rationales for paragraph 15 proffered by the courts below. It recognized that the trial court's fear of juror interviews chilling the free exchange of ideas by the retrial jurors was simply "too speculative" to support a prior restraint on the press. *Id.* at 33a. It also concluded that, with or without press interviews of discharged jurors, "the passage of time and the trial court's determination to change the venue for retrial suggest that the task of empanelling an impartial jury will not be insurmountable." *Id.*

The court nevertheless upheld the ban, based upon a different interest: preventing the prosecution from obtaining an unfair advantage on retrial of a capital case. Observing "'that the penalty of death is different,'" (Pet. App. 33a (quoting *Gregg* v. *Georgia*, 428 U.S. 153, 188 (1976))), the court held that the prior restraint was justified by the

> specific concern ... that jurors submitting to media interviews *might* reveal some insight into the jury's deliberative process that would afford the prosecution a significant advantage at the retrial and thereby provide defendant with a *colorable Sixth*

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[2] The court also modified Paragraph 15 "to extend its application only until conclusion of the retrial and the return of the verdict." Pet. App. 2a. As we discuss below at p. 8, the ban has now expired. Mootness is no bar, however, because under long-established precedent of this Court in closely related contexts, the issue is capable of repetition yet evading review. *See infra* Part III.

> *Amendment issue for appeal* in the event of a conviction.

Pet. App. 34a (emphasis added). The New Jersey Supreme Court "infer[red]" that, if interviewed by the press, jurors would "likely" reveal their reactions to the trial evidence and "might" offer observations on the strengths and weaknesses of the prosecution's case. *Id.* at 34a. The court conceded that it was "unknown" whether such revelations, if any, would affect the prosecution or defense strategies at the retrial. *Id.* Nevertheless, the court concluded that "the risk that such disclosures could provide the prosecution with an undue advantage in the retrial proceeding is sufficiently substantial to persuade us that the safer course is to disallow the interviews despite the attendant limitation on the media's First Amendment interests." *Id.*

Justice Long and Chief Justice Poritz dissented. Pet. App. 38a-48a. They argued that the majority's concern about an unfair prosecutorial advantage on retrial was "nothing more than judicial speculation," *id.* at 42a, "so remote a possibility as to be illusory," *id.* at 48a. "The retrial will be an entirely new and distinct event, with both parties beginning on equal footing, with equal access to all information reported by the media." *Id.* Thus, the juror interviews did "not present 'the kind of threat to fair trial rights that . . . possess the requisite degree of certainty to justify restraint.'" *Id.* (quoting *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 569-70 (1976)). The dissent also faulted the majority for both the underinclusiveness and overbreadth of the order it affirmed. *Id.* at 43a-46a.

4. The New Jersey Supreme Court denied Philadelphia Newspapers' motion for reconsideration on September 18, 2002. Pet. App. 49a.

5. Meanwhile, as the appeal in this case wound its way through the courts, the Superior Court ordered four *Philadelphia Inquirer* reporters to show cause why they should not be held in contempt for naming the jury

forewoman in an article questioning whether her primary residence was in New Jersey, and for contacting or attempting to interview several jurors. In May 2002 the Superior Court held a trial on the contempt charges. The court found all four reporters in contempt for violating paragraph 13 of the Superior Court media order and three of the four in contempt for violating paragraph 15. Pet App. 97a. The court made the contempt findings with regard to paragraph 13 notwithstanding the fact that the New Jersey Supreme Court had in the interim held that paragraph unconstitutional; the court reasoned that "a citizen—even one exercising First Amendment rights—must obey an Order issued by a court of competent jurisdiction until such Order is declared, by the appropriate appellate tribunal, to be a nullity." *Id.* at 95a.[3]

6. The Neulander retrial commenced in September 2002. On November 20, 2002, the jury returned guilty verdicts on all three charges of the indictment. The jury failed to reach a unanimous decision at the penalty phase of the trial. The ban on press contact or interviews with discharged jurors has now expired by its own terms. Sentencing by the trial judge is scheduled for January 2003.

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[3] The court sentenced each of the reporters to 180 days in jail. The court suspended the jail sentence of one reporter entirely on the condition that he pay a $1,000 fine and comply with the trial court's media order. The court suspended the jail sentences of the remaining three reporters on the condition that they also pay a $1,000 fine each, comply with the trial court's media order, and participate in court-enforced community service. Pet. App. 99a-106a. These contempt citations are currently on appeal.

REASONS FOR GRANTING THE PETITION

I. THE DECISION OF THE NEW JERSEY SUPREME COURT CONTRAVENED WELL-ESTABLISHED PRECEDENT OF THIS COURT ON AN IMPORTANT FIRST AMENDMENT ISSUE, WARRANTING THIS COURT'S REVIEW.

The order affirmed and expanded by the New Jersey Supreme Court was broad in scope: it forbade the press, upon pain of contempt, from contacting or attempting to interview discharged jurors for any reason, regarding any subject, and regardless of whether the juror voluntarily initiated such contact. The court ratified the order specifically in order to restrain the press from publishing juror remarks concerning the first Neulander trial. And it did so for an admittedly speculative reason: the court conceded that it was unknown whether publication of jurors' reactions would affect the retrial, and it acknowledged the absence of any precedent to support the proposition that a prosecutor's mere knowledge of how discharged jurors reacted violates the fair trial rights of a defendant facing retrial. The imposition of a prior restraint—the most serious abridgement of the First Amendment freedom of the press—cannot be justified on this meager basis. Review by this Court is warranted to re-set clear lines in a constitutionally sensitive area that has increasingly confounded lower courts.

1. *Nebraska Press Association* v. *Stuart*, 427 U.S. 539 (1976), is the only decision of this Court to address the constitutionality of a prior restraint on the press, like the one at issue here, "entered to protect a defendant's right to a fair and impartial jury." *Id.* at 556. In *Nebraska Press*, this Court recognized that imposition of prior restraints on publication of information about trials can injure the interests of justice as well as the constitutional interest in a free press: "'The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.'" *Id.* at 560 (quoting *Sheppard* v.

Maxwell, 384 U.S. 333, 350 (1966)). Accordingly, this Court ruled that "the protection against prior restraint should have particular force as applied to reporting of criminal proceedings." *Id.* at 559. Even when a defendant's right to a fair trial is at issue—as it was in the most direct way possible in *Nebraska Press*[4]—this Court declared that "barriers to prior restraint remain high and the presumption against its use continues intact." *Id.* at 570; *see also id.* at 561.

Nebraska Press established a general framework for deciding whether such restraints comport with the First Amendment. *First*, a court must examine "the nature and extent" of the asserted threat to the defendant's fair trial right. *Id.* at 562. The Court emphasized "the heavy burden of demonstrating, in advance of trial, that without prior restraint a fair trial will be denied." *Id.* at 569. The press activity to be restrained must actually and certainly endanger the defendant's right to a fair trial. *See id.* at 569; *see also Gentile* v. *State Bar of Nevada*, 501 U.S. 1030, 1070-71 (1991) ("The First Amendment protections of speech and press have been held . . . to require a showing of 'clear and present danger' that a malfunction in the criminal justice system will be caused before a State may prohibit media

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[4] In *Nebraska Press*, this Court reviewed a state court order that prohibited the press, until the impaneling of the jury, from reporting about the defendant's confessions or other facts strongly implicative of his guilt. *See* 427 U.S. at 545. The potentially countervailing Sixth Amendment interest appeared substantial. The defendant was charged with the murder of six family members in the course of a sexual assault. *See id.* at 542-43. "The crime immediately attracted widespread news coverage, by local, regional, and national newspapers, radio and television stations," *id.* at 542, and this Court found the state court "justified in concluding that there would be intense and pervasive pretrial publicity" that "might impair the defendant's right to a fair trial," *id.* at 562-63. Like Neulander, the defendant in *Nebraska Press* faced a potential death sentence if convicted. *See id.* at 546. Notwithstanding these facts, the Court held that the court order violated the First Amendment. *See id.* at 570.

speech or publication about a particular pending trial."). Speculative concerns simply are not sufficient to support a prior restraint: "the probability that [publication would deprive defendant of a fair trial] here was not demonstrated with the degree of certainty our cases on prior restraint require." *Nebraska Press*, 427 U.S. at 569; *see also id.* at 568-69 (acknowledging "risk" of prejudicial publicity, but finding it insufficiently severe).

Second, a court cannot assume that freedom of the press and the right to a fair trial are incompatible. Before imposing a prior restraint, a court must consider whether less-restrictive measures exist that would accommodate both constitutional interests. A prior restraint is not justified when a less-restrictive measure would protect a defendant's right to a fair trial. *See id.* at 562; *see also id.* at 563-64, 569. This Court concluded in *Nebraska Press* that the lower court's order failed this standard: "We cannot say on this record that alternatives to a prior restraint ... would not have sufficiently mitigated the adverse effects of pretrial publicity so as to make prior restraint unnecessary." *Id.* at 569.

Third, a court must determine whether the prior restraint would actually prove effective "to prevent the threatened danger." *Id.* at 562. The order at issue in *Nebraska Press* also failed this requirement. *See id.* at 567.

2. The decision of the New Jersey Supreme Court threatens serious erosion of these principles. This Court explained in *Nebraska Press* that a prior restraint is "the most serious and the least tolerable infringement on First Amendment rights." 427 U.S. at 559. The order here that banned press contacts and interviews with discharged jurors was a prior restraint both (a) on communications between reporters and discharged jurors that are inextricably bound up with publication of the contents of such communications, and (b) on the right of the press to gather news, *see, e.g.*, *Branzburg* v. *Hayes*, 408 U.S. 665, 681, 707 (1972). Indeed, as the reasoning of the New Jersey Supreme Court made

clear, the entire *purpose* of the order was to restrict the potential publication by the press of jurors' reactions to the evidence presented at the first trial. In contrast to a subsequent punishment, reporters violating paragraph 15 would not have been afforded the normal panoply of protections including, most importantly, the availability of a full First Amendment defense to prosecution. *See Nebraska Press*, 427 U.S. at 559.[5] Like the prior restraint in *Nebraska Press*, the sanction of the order prohibiting media contacts with or interviews of discharged jurors was "immediate and irreversible," freezing speech for more than a year. *Id.*[6]

The New Jersey Supreme Court cited *Nebraska Press* but ignored its teachings. *First*, the court never even attempted to establish that "a fair trial w[ould] be denied" absent the prior restraint. Rather, the court's "specific concern" was solely that, if jurors submitted to press interviews, they "*might* reveal some insight into the jury's

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[5] For example, even after the New Jersey Supreme Court had found Paragraph 13 to be unconstitutional, four *Philadelphia Inquirer* reporters were held in contempt for violating that provision. *See* Pet. App. 95a-96a.

[6] The order did not constitute a mere restriction on the right of the public and press to "access" criminal trials or governmental information. *Cf. Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1 (1986) ["*Press-Enterprise II*"]; *Press-Enterprise Co.* v. *Superior Court*, 464 U.S. 501 (1984) ["*Press-Enterprise I*"]; *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596 (1982); *Pell* v. *Procunier*, 417 U.S. 817 (1974). The Court's "right of access" cases concern government fora or information to which the public as a whole is not granted access. This case involves the *opposite* context: the New Jersey courts made no effort to seal the jury deliberations off from the public generally (discharged jurors were free to discuss or publish their views or recollections of the trial as they saw fit) and proscribed contact only with the press. Thus, Philadelphia Newspapers does not seek "special access to information not shared by members of the public generally," *Pell*, 417 U.S. at 834; instead it desires to learn and publish information available to anyone else. Accordingly, the *Nebraska Press* doctrine and not the "right of access" cases is most pertinent here.

deliberative process that would afford the prosecution a significant advantage at the retrial and thereby provide defendant with a *colorable* Sixth Amendment issue for appeal in the event of a conviction." Pet. App. 34a (emphases added). This Court rejected similar speculation in *Nebraska Press*. The scope of restrictions on publication potentially validated by such an approach is limited only by the imagination of counsel and the courts in hypothesizing "colorable" Sixth Amendment claims.

The New Jersey Supreme Court cited no authority for the proposition that a prosecutor's mere knowledge of discharged jurors' thought processes violates a defendant's constitutional right to a fair retrial. To petitioner's knowledge, no authority exists for that proposition, especially when jurors' observations would be equally available to the defendant. A prosecutor does not gain any advantage at all—much less an *unfair* advantage—when the defendant learns the same thing at the same time. Indeed, even when the prosecution *suppresses* actual evidence, and thereby obtains an informational advantage over a defendant, the Court has not held that such conduct invariably violates the Due Process Clause. *See, e.g.*, *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963). In short, the single concern articulated by the court below is a far cry from any fair-trial violation previously recognized by this Court. The New Jersey Supreme Court recognized the absence of authority for its position, and therefore described its decision essentially as a means to prevent novel Sixth Amendment claims from even arising on appeal: "[O]ur pragmatic understanding of and long experience in death penalty appellate litigation impel us to intervene in order to avoid Sixth Amendment issues that inevitably would be raised if we stayed our hand." Pet. App. 37a-38a.[7]

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[7] Even the New Jersey Supreme Court's own precedent appears to demonstrate that mere prosecutorial knowledge of a hung jury's

Thus, the New Jersey Supreme Court affirmed the order barring press contacts and interviews with discharged jurors in circumstances plainly lacking "the degree of certainty our cases on prior restraint require." *Nebraska Press*, 427 U.S. at 569. The court itself acknowledged that the purported threat it identified was far from certain. For example, the court speculated that discharged juror interviews "might" reveal information of significance, Pet. App. 34a; that if so there was only a "potential" that juror interviews would "afford[] the prosecution an inappropriate advantage in a retrial," *id.* at 34a; and that "[w]hether [juror interviews] significantly would have affected the retrial strategies of the prosecution and defense is unknown," *id.* This Court, however, has emphasized that a "clear and present danger" to a defendant's right to a fair trial must be identified before a prior restraint may be imposed on the press. *Gentile*, 50' U.S. at 1070-71; *Nebraska Press*, 427 U.S. at 569 (threat to defendant must be proven with requisite "degree of certainty"). The New Jersey court in effect reversed the presumption of *Nebraska Press*. Rather than presuming that prior restraints are unconstitutional and resorting to their imposition only upon a showing of true necessity, the court authorized a prior restraint based upon slight threats to the defendant's fair trial

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deliberations would not constitute a violation of a defendant's fair trial right. In *State* v. *Cruz*, 171 N.J. 419, 794 A.2d 165 (2002), a capital case, the trial court declared a mistrial after the jury was unable to reach a unanimous verdict on any charges. The trial judge then questioned the jury forewoman in open court regarding the jurors' votes on the various counts. *See id.* at 423-25, 794 A.2d at 168-69. In response to the court's questions, the forewoman described not only the vote breakdown, but also the jurors' general sentiments regarding the State's case. *See, e.g., id.* at 425, 794 A.2d at 169 ("Most of the people felt [the defendant] was present, but just didn't think there was enough evidence to substantiate his participation."). Notwithstanding the fact that the jury's reactions thereby became available to the prosecution, the New Jersey Supreme Court remanded the case for retrial. *Id.* at 434, 794 A.2d at 176.

right simply because it was "the safer course." Pet. App. 34a.[8]

Second, the New Jersey Supreme Court failed to consider obvious less-restrictive measures that would have addressed its concerns about Neulander's fair trial rights without a prior restraint or with a far narrower one. For example, even if (as seems unlikely) the prosecution might have secured some unfair advantage by reading general news reports about the first trial, the court could have ordered the prosecuting team to screen itself from all post-trial press coverage pertaining to the jury deliberations. *Cf. United States* v. *Poindexter*, 698 F. Supp. 300, 312-13 (D.D.C.) (recounting scrupulous efforts of Iran-Contra Independent Counsel prosecution team to avoid exposure to immunized congressional testimony of Oliver North), *appeal dismissed by*, 859 F.2d 216 (D.C. Cir. 1988). This would have eliminated entirely any risk of "unfair advantage."

Moreover, even if some restraint were appropriate to address the court's concern—and it was not—the order prohibited the press from contacting jurors *at all* or interviewing them about *any* subject, even if totally unrelated to the Neulander trial or even jury duty more generally. Less-restrictive measures plainly existed to address the court's stated concern. For example, the New Jersey Supreme Court could have limited paragraph 15 to proscribe only interviews with the discharged jurors that concerned the details of their deliberations in the first trial. *See, e.g., In re Globe Newspaper Co.*, 920 F.2d 88, 94 (1st Cir. 1990) ("Although the district judge here assumed that the Globe

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[8] That Neulander faced a capital sentence does not change matters: the defendant in *Nebraska Press* was in the same position. *See* 427 U.S. at 546. It simply does not follow that a prosecutor's awareness of a hung jury's observations—if such awareness could even be termed unfair—is more unfair to a defendant charged with a capital crime than to any other defendant.

sought access solely to inquire into the deliberative process, other avenues of inquiry are conceivable. Juror bias or confusion might be uncovered, and jurors' understanding and response to judicial proceedings could be investigated."). In this case, *Philadelphia Inquirer* reporters pursued just such an alternative subject—whether the jury forewoman was in fact a resident of Pennsylvania. *See supra*, p. 5. The sweeping restraint affirmed and expanded by the New Jersey Supreme Court thus proscribed a broad swath of legitimate inquiry and speech with no relation to the court's articulated Sixth Amendment concern. Yet the court made no specific findings regarding the availability of less-restrictive measures. *Cf. Nebraska Press*, 427 U.S. at 563-65.

Third, the New Jersey Supreme Court failed to acknowledge that the prior restraint was unlikely to serve the purported interest in sealing off prosecutors' access to information about the first jury's deliberations. The order left discharged jurors free to discuss their deliberations with everyone *except* representatives of the media—leaving the press free to ascertain, and report on, the jurors' reactions to the trial through third parties.[9] The order also left jurors free to broadcast their observations to the public via book, Internet, or other means.[10] And the utility of any juror

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[9] This was no mere hypothetical issue. The *Philadelphia Inquirer* published an article describing reactions of the first Neulander jury based on statements from "a person who spoke to one of the jurors." Joseph A. Gambardello et al., *Rabbi Juror: "We All Saw It A Totally Different Way,"* Philadelphia Inquirer, Nov. 16, 2001, at A1, *available at* 2001 WL 29265198.

[10] *See, e.g.*, D. Graham Burnett, *A Trial By Jury* (2002) (describing author's experience as jury foreman in New York City murder trial); Elizabeth Amon, *When Jurors Decide to Write Books: Andersen Trial Raises Questions About Impact on Deliberations*, Nat'l L.J., July 8, 2002, at A6; Dave Winer, *Jury Duty*, DaveNet, Mar. 1, 1996, *at* http://davenet.userland.com/1996/03/01/juryduty (personal Internet weblog entry describing author's service on a jury, including jury deliberations).

interview ban was questionable given the substantial press coverage the trial had attracted. As the dissent pointed out: "Simply stated, no aspect of this case has escaped public discourse. Thus, it is extremely unlikely that any comments made by former jurors would give even a crumb of new insight to a moderately competent prosecutorial team." Pet. App. 43a (Long, J., dissenting).

In sum, the New Jersey Supreme Court upheld and expanded an order barring the press from contacting or attempting to interview discharged jurors based on frankly speculative concerns, without considering obvious less-restrictive alternatives, and despite strong reason to doubt that the prior restraint would meaningfully address the court's stated Sixth Amendment concerns. The nature and magnitude of the error here make this case especially deserving of review. As members of this Court have noted in describing the unique problems associated with prior restraints on the press, "given the significant financial disincentives, particularly on the smaller organs of the media, to challenge any restrictive orders once they are imposed by trial judges, there is the distinct possibility that many erroneous impositions would remain uncorrected." *Nebraska Press*, 427 U.S. at 610-11 (Brennan, J., concurring in the judgment) (footnotes omitted).

II. THE DECISION OF THE NEW JERSEY SUPREME COURT IS IN SEVERE TENSION WITH LEADING DECISIONS OF FEDERAL COURTS OF APPEALS AND AT LEAST ONE STATE HIGH COURT.

A. There Is Confusion Regarding the Permissibility and Scope of Orders Restraining the Press from Interviewing Discharged Jurors.

As discussed above, this Court has decided only one case involving the constitutionality of a prior restraint imposed to protect a defendant's fair trial rights, and that

case is more than 26 years old. *See Nebraska Press*, 427 U.S. 539.[11] The Court has never examined the First Amendment implications of court orders restraining the ability of the press to contact and interview discharged jurors. In this void, the lower courts have diverged significantly on the constitutional permissibility of various kinds of restraints on juror interviews. The decision below in the present case represents a new extreme on that spectrum and warrants this Court's review.

The New Jersey Supreme Court's ruling is in serious tension with decisions of the federal courts of appeals for the Fifth, Ninth, and Tenth Circuits, and a decision of the Supreme Court of Ohio, all of which have held unconstitutional prior restraints of comparable breadth. In *United States* v. *Sherman*, 581 F.2d 1358 (9th Cir. 1978), for example, the Ninth Circuit vacated an order barring all persons, including the media, from contacting discharged jurors in a criminal case. Because the order imposed a restraint on the media's right to gather news prior to any attempt to contact the jurors, the Ninth Circuit subjected the order to the First Amendment's "heavy presumption against . . . constitutional validity" applicable to prior restraints. *Id.* at 1361. The Ninth Circuit found no countervailing Sixth Amendment interest because the trial had ended, and noted the clear availability of less-restrictive alternatives. *Id.* "A juror may speak or remain silent as he desires," the court explained. "The district court's order, by depriving the

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[11] Outside the prior restraint context, this Court has not considered the interplay between the First Amendment guarantee of freedom of the press and the defendant's right to a fair trial in more than nine years. *See El Vocero de Puerto Rico* v. *Puerto Rico*, 508 U.S. 147 (1993) (*per curiam*) (reversing without oral argument lower court decision due to conflict with *Press-Enterprise II*, 478 U.S. 1 (1986)). The Court decided a case involving the Free Speech Clause of the First Amendment and the right to a fair trial approximately eleven years ago in *Gentile*, 501 U.S. 1030 (1991).

media of the opportunity to ask the jurors if they wished to be interviewed, was clearly erroneous as a matter of law." *Id.* at 1362.

In *In re Express-News Corp.*, 695 F.2d 807 (5th Cir. 1982), a newspaper and one of its reporters challenged a local court rule forbidding any person to interview any juror concerning the deliberations or verdict of the jury except on leave of court granted upon good cause shown. Relying in part on *Sherman*, the Fifth Circuit held the rule unconstitutional under the First Amendment as applied to the media plaintiffs because it had not been tailored to prevent a substantial threat to the administration of justice. The court noted that the rule "appl[ied] equally to jurors willing and anxious to speak and to jurors desiring privacy, forbidding both courteous as well as uncivil communications, and foreclosing questions about a juror's general reactions as well as specific questions about other jurors' votes that might, under at least some circumstances, be inappropriate." *Id.* at 810. The court added that "[a]bsent good cause for restraint, petit jurors are free to discuss their service if they choose to do so." *Id.*

In *Journal Publishing Co.* v. *Mechem*, 801 F.2d 1233 (10th Cir. 1986), the Tenth Circuit vacated an order prohibiting the press from contacting discharged jurors in a civil case. The court applied the presumption that prior restraints violate the First Amendment and then vacated the order as "impermissibly overbroad. . . . [T]he court could not issue a sweeping restraint forbidding all contact between the press and former jurors without a compelling reason." *Id.* at 1236-37; *see also United States* v. *Dempsey*, 830 F.2d 1084, 1089 (10th Cir. 1987) ("There is no strict secrecy rule; jurors are not prohibited by law from discussing their deliberation after the case is over. Absent good cause for restraint, jurors are free to discuss their service as they choose." (citing *In re Express-News Corp.*, 695 F.2d at 810)).

The Supreme Court of Ohio, in a capital case, also has held unconstitutional a broad order similar to that upheld by the New Jersey Supreme Court in the present case. In *State ex rel. Cincinnati Post* v. *Court of Common Pleas*, 59 Ohio St. 3d 103, 570 N.E.2d 1101 (1991), the court decided that a trial court order barring contact with discharged jurors violated the First Amendment. Relying on *Sherman*, *In re Express News Corp.*, and *Journal Publishing Co.*, the Ohio Supreme Court found the order overbroad for at least two reasons. First, the order did not permit jurors to choose voluntarily to speak to others about the case. *Id.* at 105, 570 N.E.2d at 1103. Second, the order restrained more speech than necessary to protect the proffered interest of freedom of debate in the jury room: "[The] order would prohibit a juror from waiving the confidentiality of even his own votes and opinions. Such a 'categorical denial of all access,' not tailored to the objectives cited to justify it, violates the First Amendment." *Id.* at 106, 570 N.E.2d at 1104 (quoting *In re Express-News Corp.*, 695 F.2d at 811).

The decisions of other lower federal and state courts are also in significant tension with the New Jersey Supreme Court's opinion. *See United States* v. *Franklin*, 546 F. Supp. 1133, 1144-45 (N.D. Ind. 1982) (order barring media contact with discharged jurors conflicts with First Amendment); *Contra Costa Newspapers, Inc.* v. *Superior Court*, 72 Cal. Rptr. 2d 69, 72-73 (Ct. App. 1998) (order barring media contact with discharged jurors is unconstitutional prior restraint); *Sentinel Communications Co.* v. *Watson*, 615 So. 2d 768, 773-74 (Fla. Dist. Ct. App. 1993) (order barring media contact with discharged jurors in capital case is unconstitutional prior restraint; case decided while defendant's motion for new trial was still pending). The Sixth Circuit has indicated in dicta that it likely would strike under the First Amendment an order barring discharged

jurors from talking to the media. *See In re Memphis Publishing Co.*, 887 F.2d 646, 649 (6th Cir. 1989).[12]

On the other hand, some courts have upheld limited restrictions on press contact with discharged jurors, though none so sweeping as the order here. For example, the Third Circuit in *United States* v. *Antar*, 38 F.3d 1348 (1994), upheld an order that barred the press from inquiring into the specific votes, statements, opinions, or other comments of any juror during deliberations other than the juror being interviewed. *Id.* at 1363. It based its holding on recognition of the "concern[] about the potential negative effect of disclosures by former jurors upon the freedom and candor of deliberations in future cases." *Id.*[13] In the same case,

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[12] The Judiciary/Media Steering Committee of the Supreme Judicial Court of Massachusetts has issued nonbinding guidelines to Massachusetts judges. Those guidelines call into question, at least in Massachusetts, the propriety of the broad order affirmed and modified by the New Jersey Supreme Court in this case. The guidelines also highlight the continuing uncertainty in this area of the law. *See* Supreme Judicial Court of Massachusetts Judiciary/Media Steering Committee, *Guidelines on the Public's Right of Access to Judicial Proceedings and Records* (2000), *at* http://www.state.ma.us/courts/courtsandjudges/courts/supremejudicialcourt/pubaccesstoc.html. Regarding orders barring the press from interviewing discharged jurors, the guidelines provide the following instruction: "Post-trial, unless the standard set out in *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976), can be met, judges should not forbid the media from speaking with jurors nor forbid jurors from speaking with the media. It remains unresolved to what extent, if at all, a judge may limit the scope of a reporter's post-trial inquiry into jury deliberations." *Id.* at § IV.E (footnotes omitted).

[13] The Third Circuit cited the *Handbook for Trial Jurors Serving in the United States District Courts* in its discussion. Generally, the *Handbook* recommends permitting jurors to decide themselves whether to grant interviews after the trial. The *Handbook* also provides, though, that "the court may enter an order *in a specific case* that during any . . . interview, jurors may not give any information with respect to the vote of any other juror." *Handbook*, *at* http://www.dcd.uscourts.gov/juryhandbook.html (emphasis added).

however, the court held unconstitutional portions of the same order barring the press from either making repeated contacts with discharged jurors or attempting to resume interviews after a juror expressed a desire to conclude an interview. *Id.* at 1364. Although recognizing a court's power to prevent harassment of jurors, the Third Circuit held that the threat of such harassment must be more than hypothetical. *Id.* at 1363.

Similarly, in three cases decided after *Express News Corp.*, the Fifth Circuit has upheld orders imposing limited restrictions on the ability of the press to interview discharged jurors. *See United States* v. *Brown*, 250 F.3d 907 (5th Cir. 2001); *United States* v. *Cleveland*, 128 F.3d 267 (5th Cir. 1997), *cert. denied*, 523 U.S. 1075 (1998); *United States* v. *Harrelson*, 713 F.2d 1114 (5th Cir. 1983), *cert. denied*, 465 U.S. 1041 (1984). The court articulated several bases for imposition of limited orders barring press interviews of discharged jurors. For example, in *Harrelson*, the Fifth Circuit held that "jurors, even after completing their service, are entitled to privacy and to protection against harassment." 713 F.2d at 1116; *see also Brown*, 250 F.3d at 918, 921. Citing this Court's juror privilege decision in *Clark* v. *United States*, 289 U.S. 1, 13 (1933), the Fifth Circuit also recognized an interest in protecting the freedom of debate in the jury room. *Cleveland*, 128 F.3d at 270; *Harrelson*, 713 F.2d at 1118. The orders at issue in these three cases, however—unlike the order here—permitted the press to pursue interviews initiated by jurors and barred inquiry only into actual jury deliberations. *See Brown*, 250 F.3d at 912; *Cleveland*, 128 F.3d at 269; *Harrelson*, 713 F.2d at 1116. In each case, those important limitations, absent here, were critical to the Fifth Circuit's decision to uphold the particular order against First Amendment challenge. *See Brown*, 250 F.3d at 920-21; *Cleveland*, 128 F.3d at 270; *Harrelson*, 713 F.2d at 1118.

The decisions of the Third and Fifth Circuits support the ruling of the New Jersey Supreme Court only to the extent

that it proscribed interviews of discharged jurors, initiated by the press, regarding the actual deliberations of the jury. The New Jersey order would nevertheless be questionable in the Third and Fifth Circuits because it bans inquiry into any and all subjects, and even when the juror initiates the contact.

B. This Case Presents an Important Opportunity for this Court to Clarify the Appropriate Balance Between the Competing Interests in this Area.

As the Third Circuit observed in *Antar*, "[t]he issue of media access to jurors is a subject of vigorous debate," and "there is substantial debate about the value of post-verdict interviews." 38 F.3d at 1357, 1363.[14] Courts and commentators have recognized that media interviews of discharged jurors serve several important values, including educating the public about the jury's case-specific decision and the obligations of jury duty more generally, enhancing public confidence in the judicial system, and protecting against improper conduct in the jury process. *See, e.g.*, Iversen, *supra*, at 523-24; *United States* v. *Posner*, 644 F. Supp. 885, 886 n.2 (S.D. Fla. 1986) (juror misconduct warranting new trial uncovered by newspaper reporters), *aff'd sub nom. United States* v. *Scharrer*, 828 F.2d 773 (11th Cir. 1987). As the First Circuit observed in a related context, juror information "serves to educate the public regarding the

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[14] Numerous commentators have entered the debate as well. *See, e.g.*, Abraham S. Goldstein, *Jury Secrecy & the Media: The Problem of Postverdict Interviews*, 1993 U. Ill. L. Rev. 295; Nancy S. Marder, *Deliberations & Disclosures: A Study of Post-verdict Interviews of Jurors*, 82 Iowa L. Rev. 465 (1997); David Weinstein, *Protecting a Juror's Right to Privacy: Constitutional Constraints & Policy Options*, 70 Temp. L. Rev. 1 (1997); Copernicus T. Gaza, Note, *Getting Inside the Jury's Head: Media Access to Jurors After the Trial*, 12 N.Y.L. Sch. J. Hum. Rts. 311 (1995); Christine J. Iversen, Comment, *Post-verdict Interviews: The Key to Understanding the Decision Behind the Verdict*, 30 J. Marshall L. Rev. 507 (1997); Note, *Public Disclosures of Jury Deliberations*, 96 Harv. L. Rev. 886 (1983).

judicial system and can be important to public debate about its strengths, flaws and means to improve it." *Globe Newspaper Co.*, 920 F.2d at 94. In this respect, post-verdict juror interviews are a particular manifestation of the public scrutiny of criminal trials often praised by this Court. *See, e.g., Globe Newspaper Co.*, 457 U.S. at 606.

The decision by the New Jersey Supreme Court heightens the uncertainty in this constitutionally sensitive area. Its reasoning is in severe tension with the reasoning of all other significant rulings regarding the permissible breadth of restraints on press contact with discharged jurors. And it breaks dangerous new ground in holding that an interest as speculative as that advanced below could justify a prior restraint on the press in this or any context.

This Court has recognized that the law in this area is best developed through application of broad, guiding First Amendment principles to particular factual situations. In *Nebraska Press*, 427 U.S. at 569, the Court observed:

> Of necessity our holding is confined to the record before us. But our conclusion is not simply a result of assessing the adequacy of the showing made in this case; it results in part from the problems inherent in meeting the heavy burden of demonstrating, in advance of trial, that without prior restraint a fair trial will be denied. The practical problems of managing and enforcing restrictive orders will always be present. In this sense, the record now before us is illustrative rather than exceptional.

As in *Nebraska Press*, the record here provides a good vehicle for clarifying the law in this area. At various stages of review, the New Jersey courts have relied on almost every conceivable rationale for sustaining the prior restraint. Thus, the record permits this Court to consider both longstanding arguments that have been debated in the various decisions in the lower courts across the country as well as the

unprecedented justification adopted by the New Jersey Supreme Court. In any event, the decision squarely implicates the critical First Amendment principles that threats to fair trial rights must be imminent and non-speculative, and that the prior restraint must be tailored as narrowly as possible to avert the threat. Review here would permit the Court to reestablish the core principle that prior restraints on the press are presumptively invalid, and subject to a very high burden of justification, even when imposed by courts to advance perceived interests of the judicial process.

It is important that this Court review the judgment of the New Jersey Supreme Court now, before its harmful precedential effects become more widespread. To petitioner's knowledge, since the *Neulander* decision at least one other New Jersey trial court has imposed a similar order barring press contact with discharged jurors.[15] And the high public profile of this case will likely afford the New Jersey Supreme Court's decision disproportionate impact nationwide. Even prior to the opinion below, reports indicated that restraints on contact between the press and discharged jurors had become increasingly commonplace around the nation.[16] Review now by this Court would

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[15] *See State* v. *Powell*, No. 01-04-170-I (N.J. Super. Ct. Aug. 9, 2002) (Pet. App. 111a-112a) (announcing order barring contact between press and discharged jurors in non-capital case involving charges of manslaughter, vehicular homicide, and aggravated assault when first trial resulted in mistrial on two charges); *see also* Lisa Teachey, *Court Orders Alarm Media Legal Experts*, Houston Chronicle, Nov. 20, 2002, at 27, *available at* 2002 WL 23239458 (describing recent order by Texas trial court barring reporters from conducting post-verdict interviews of jurors).

[16] *See, e.g.*, *Court Rejects Bid Against Ban on Contacting Jurors*, San Antonio Express-News, Sept. 26, 2001, at 2B, *available at* 2001 WL 26840574 (describing unpublished Fifth Circuit order affirming district court ban on unsolicited contact with discharged jurors in civil case); Ashley Gauthier, *Two Courts Bar Juror Contact*, News Media & L., Oct. 1, 2001, at 46, *available at* 2001 WL 18209346 (describing above Fifth Circuit order and Texas state trial court order in Andrea Yates case

eliminate "the distinct possibility that many erroneous impositions would remain uncorrected." *Nebraska Press*, 427 U.S. at 611 (Brennan, J., concurring in the judgment).

III. This Case Is Not Moot Because the First Amendment Issue Is Susceptible of Repetition Yet Evading Review.

The court order in this case barring the press from contacting or attempting to interview the discharged jurors has expired by its own terms. The case is not moot, however, because the issue presented is manifestly capable of repetition yet evading review. This Court has on numerous occasions considered First Amendment challenges to similar orders imposed during criminal trials. In each case, the Court found no jurisdictional obstacle to considering and deciding the case because, although the particular restraint had expired by the time the case reached this Court, the controversy was capable of repetition yet evading review. *See, e.g.*, *Press-Enterprise II*, 478 U.S. at 6 (order temporarily refusing access to transcript of preliminary hearing); *Globe Newspaper*, 457 U.S. at 602-03 (order denying access to criminal trial involving minor victims of sexual offenses); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 563 (1980) (order denying access to criminal trial); *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 377-78 (1979) (order denying access to pretrial hearing in criminal case); *Nebraska Press*, 427 U.S. at 546-47.

This Court has held that two factors make orders like the one at issue here capable of repetition yet evading review. First, it is reasonably foreseeable that the petitioners, members of the press in the relevant jurisdictions of the

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barring press from interviewing jurors from competency proceeding until conclusion of later-conducted trial); Melissa Grace, *Jurors Let Verdict Speak for Itself*, Times Union (Albany), Feb. 26, 2000, at A5, *available at* 2000 WL 6732447 (describing judge's order in Amadou Diallo case barring press from contacting discharged jurors or alternate jurors).

challenged restrictions, will be subjected to similar orders in the future. *See, e.g.*, *Gannett*, 443 U.S. at 377-78. Second, because orders whose duration depends on the length of a criminal trial are by their nature short-lived, it is a virtual certainty that any future orders would expire before plenary review could be conducted by this Court. *See, e.g.*, *Globe Newspaper*, 457 U.S. at 603. Both principles have become so well-accepted that in *Press-Enterprise II* this Court disposed of the mootness issue in one short paragraph. *See* 478 U.S. at 6. They apply with particular force here. Mootness, accordingly, provides no obstacle to review of the First Amendment issue in this case.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted. Alternatively, the Court may wish to consider summary disposition.

Respectfully submitted,

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